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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 978

M. S. CHAMBLISS,
Petitioner,

v.

COCA-COLA BOTTLING COMPANY,
WILLIAM O. MASHBURN, JR., and
GOLDMAN, SACHS & COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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10-10-69-60

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

M. S. Chambliss, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States

Circuit Court of Appeals for the Sixth Circuit entered in the above-styled case July 24, 1969, a timely petition to rehear being denied September 25, 1969.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit printed in Appendix hereto, page 22-23, is reported in 414 F.2d 256. The opinion of the United States District Court printed in Appendix hereto, page 1-20, is reported in 274 F. Supp. 401.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 24, 1969, (infra Appendix p. 25). A petition for rehearing was filed (Appendix, p. 26). Rehearing was denied on September 25, 1969, infra (Appendix, p. 29). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(a) Whether the Court of Appeals erred in affirming the judgment of the District Court in this action in conflict with a decision of this Honorable Court which held that the pendency of an action tolls the statute of limitations under a "given set of facts" or under "given circumstances". The decision relied upon is ***Burnett v. New York Central***, (1965) 380 U.S. 424.

(b) Whether the Court of Appeals erred in affirming the judgment of the District Court, which, on October 4, 1967, held the *Burnett* decision (*supra*), did not control

because it leaned "quite heavily upon the humane and remedial policy" of the statute (FELA) under consideration, and that it was aware of no authority which would justify the conclusion that Congress intended the Securities Act to be remedial. This was in conflict with *Tcherepnin v. Knight*, (1967) 389 U.S. 564, December 18, 1967, decided several months after the opinion of the District Court October 4, 1967, which clearly held the Securities Acts *are remedial*.

(c) Whether the Court of Appeals erred in affirming the judgment of the District Court in conflict with decisions of other Courts of Appeal. The conflicting cases in order of their publication are: *Union Carbide v. Nesley*, 300 F.2d 561; *Escott v. Barchris Construction Co.*, 340 F.2d 731; *Esplin v. Hirschi*, 402 F.2d 94; *Foster v. City of Detroit*, 405 F.2d 138; *Green v. Wolf Corp.*, 406 F.2d 291; all holding that pendency of a class action tolls the statute of limitations for members of the class.

(d) Whether the Court of Appeals erred in affirming the judgment of the District Court in this action under Rule 23 of the Federal Rules of Civil Procedure. The action was instituted March 22, 1965, amended Rule 23 became effective July 1, 1966, and specifically applied to actions pending. It was construed in *Escott v. Barchris*, 340 F.2d 731 in 1965. The decision in the District Court was October 4, 1967.

(e) Whether the Court of Appeals erred in affirming the holding of the District Court that "The Court holds that the limitation period provided in the federal securities acts cited herein are not tolled * * * by the commencement of a prior action * * * which action failed for lack of federal jurisdiction where the defendant could at any time have been sued in its home district" (Appendix, p. 34-35), the language

of the Court of Appeals in affirming reading: "plaintiff-appellants have failed to file this litigation in the Southern District of Ohio, where the jurisdiction over defendant could have been obtained and the issues could have been adjudicated on their merits." (Appendix, p. 23).

The language of both Courts becomes especially significant in view of the fact Goldman Sachs sent a representative from New York to Chattanooga and was paid $25,000.00 by the Corporation (undisclosed) and also two Chattanooga brokers were paid a total of $20,000.00 for services in connection with the transaction. This holding is entirely at odds with the remedy and scope as expressed in the Security Acts quoted in *Hooper v. Mountain States*, 282 F.2d 195 (1960) where an interstate telephone call sufficed to establish venue in the district of the actionable wrong.

STATUTE INVOLVED

Statutes involved are the Securities Act of 1933 and the Securities Exchange Act of 1934.

Rule 23 of the Federal Rules of Civil Procedure.

STATEMENT

The fact that this is one of several class suits, all threshold cases, appears clear from the excerpt from a brief the defendants' attorney filed in the Court of Appeals which is set out in the Appendix page 40-43.

The complaint as amended, which should be construed in favor of its sufficiency, sets forth that defendants disregarded the Securities Acts and in so doing, used interstate communication means. (Appendix, p. 34-35). The

suit is one in which Congress has fixed a venue for a wrong in the district in which it was transacted. Congress has the power to do this. *Hooper v. Mountain States*, 282 F.2d 195 (1960) is an instance. The allegations in the complaint are the bases of jurisdiction in the District Court.

REASONS FOR GRANTING THIS WRIT

(a) and (b) in the foregoing "Questions Presented" are grounded on *Burnett v. New York Central*, 380 U.S. 424 and *Tcherepnin v. Knight*, 389 U.S. 564. The opinion of the District Judge for a page and a half earnestly discussed the rationale of *Burnett*. It then held, contrary to *Tcherepnin*, which had not been decided, that such a view of the Securities Acts as remedial was not justified and gave as a reason "defendant could at any time have been sued in its home district."

This was affirmed by the Court of Appeals without discussion.

(c) Both the District Court and the Court of Appeals erred in ruling in conflict with *Richmond v. Irons*, 121 U.S. 27 which clearly held that the pendency of a class action tolls the statutes of limitations.

(d) The Court of Appeals erred in not following a ruling by that Court that class actions effect tolling, this being the rule stated in *Foster v. City of Detroit*, 1968, 405 F.2d 138. Other Circuit Courts of Appeal cited above and omitted here for brevity so hold. The facts as to the pendency of class suits in the present litigation are set forth elaborately in the defendants' brief. See Appendix p. 40-43.

(e) The Court of Appeals erred in affirming the judgment of the District Court in this action under Rule 23 of the Federal Rules of Civil Procedure. The action was instituted March 22, 1965, amended Rule 23 became effective July 1, 1966, and specifically applied to actions pending. It was construed in *Escott v. Barchris*, 340 F.2d 731 in 1965.

(f) The Court of Appeals erred in affirming the holding of the District Court that "The Court holds that the limitation period provided in the federal securities acts cited herein are not tolled * * * by the commencement of a prior action * * * which action failed for lack of federal jurisdiction where the defendant could at any time have been sued in its home district" (Appendix, p. 34-35), the language of the Court of Appeals affirming being: "plaintiffs-appellants have failed to file this litigation in the Southern District of Ohio, where the jurisdiction over defendant could have been obtained and the issues could have been adjudicated on their merits." (Appendix, p. 23). This was error in both opinions and in conflict with *Hooper v. Mountain States*, 282 F.2d 195 (decided in 1960), which held that an interstate telephone communication supported venue where it was a part of a transaction in violation of the Securities Acts. Such opinions tend to create confusion as to venue.

CONCLUSION

For the reasons set out above, it is respectfully requested that the writ issue, and the Courts below be instructed to hear the merits of this case.

Respectfully submitted,

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Attorney for Petitioner.

[fol. 1] [Caption Omitted]

OPINION OF THE DISTRICT COURT

(Filed October 4, 1967)

This is an action in which plaintiff, on behalf of herself and her class,[1] seeks to have declared void the purported conversion by defendant Coca-Cola Bottling Corporation of equity stock into debentures. The case is before the Court upon the defendants' motion to dismiss upon the following grounds: (1) lack of in personam jurisdiction, (2) improper venue, and (3) failure to state a claim upon which relief can be granted.

Before going into the merits of the issues presented by the motion, it is appropriate that the Court review to some extent the background of this litigation. In late 1960, the Coca-Cola Bottling Corporation undertook a recapitalization plan. At that time, it had issued and outstanding either 16,179 or 20,000[2] shares of Class "A" stock. Plaintiff owned two of these shares. Coca-Cola also had outstanding some 20,000 shares of Class "B" stock. Pursuant to the recapitalization plan, the Class "A" stock was purportedly[3] converted into debentures in the face amount of $130.00 each, bearing interest at 6% and having a due date

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[1] Plaintiff brings this lawsuit as a class action, contending that she represents all other holders or former holders of Class "A" stock of defendant Coca-Cola Bottling Corporation, alleging that common questions of law and fact are involved and common relief sought for the entire class.

[2] According to the complaint, 16,179, but according to the affidavit of the corporate defendant's officer, 20,000. The exact number is not material.

[3] The word "purportedly" is used because one of the incipient issues in this lawsuit is whether such conversion was effectual in the legal sense.

December 30, 1990. The plan went into effect upon December 30, 1960. Plaintiff and other holders of Class "A" stock certificates have refused to surrender their certificates.[4]

The present lawsuit is the latest of a series of litigation arising out of the events described in the preceding paragraph. The first was docketed as Civil Action No. 3537 in this court, styled *J. Polk Smartt and Isabel Smartt v. Cincinnati Coca-Cola Bottling Corporation*. It was filed June 30, 1961. Upon October 9, 1961, service
[fol. 2] of original process was quashed by the Court. Upon March 26, 1962, further service was quashed and the suit dismissed. Upon April 10, 1962, an amendment to the complaint was rejected, service was quashed and the suit dismissed. An appeal was taken to the Court of Appeals for the Sixth Circuit, which Court affirmed the action of this Court in an opinion dated June 18, 1963. *Smartt v. Cincinnati Coca-Cola Bottling Corporation*, (C.A. 6, 1963) 318 F.2d 447.

A suit docketed as Civil Action No. 3878 in this court, *J. P. Smartt and Isabel Smartt v. Coca-Cola Bottling Corporation*, was filed upon May 2, 1962. On May 5, 1962, this suit was dismissed without prejudice and the summons was returned unexecuted upon May 9 at the request of counsel for plaintiffs.

A third suit was filed on August 27, 1963, styled *J. Polk Smartt and Isabel Smartt u. Coca-Cola Bottling Corpora-*

[4]According to the answers of defendant Coca-Cola to interrogatories, as of May, 1965, some 189 Class "A" stock certificates had not been surrendered. In varying numbers, they stand in the respective names of J. Polk Smartt, Mrs. Isabel T. Smartt, Mrs. M. S. Chambliss, Morris D. Cohen, and Carl L. Gibson.

tion,[5] and was docketed as Civil Action No. 4165 in this court. On October 31, 1963, service of original process was quashed. An appeal was taken to the Sixth Circuit, and an opinion affirming this Court was entered upon October 28, 1964. *Smartt v. Coca Cola Bottling Corporation*, (C.A. 6, 1964) 338 F.2d 950.

The present action was filed upon March 22, 1965.

As hereinabove stated, the defendants assert three grounds in support of their motion to dismiss: (1) lack of in personam jurisdiction, (2) improper venue, and (3) failure to state a claim upon which relief can be granted. Because of the nature of the federal statutes relied upon by plaintiff, these three grounds may be considered contemporaneously, as will appear shortly.

In prior litigation, the plaintiffs have never succeeded in bringing the defendant, Coca-Cola Bottling Corporation, before the Court in a manner that the Court would have personal jurisdiction over the defendant.

In Civil Action No. 3537, the plaintiffs attempted to establish personal jurisdiction over Coca-Cola
[fol. 3] by substituted service under T.C.A. 20-220, which provides for the exercise of judicial power over a foreign corporation when such corporation is found to be "doing business" in the State of Tennessee.[6] The

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[5] M. S. Chambliss, the plaintiff in the instant action, and C. L. Gibson had intervened in the District Court and prosecuted the appeal when the original plaintiffs declined to do so. 338 F.2d 950, 951.

[6] T.C.A. 20-220 provides as follows: **"Foreign corporations subject to actions.** — Any corporation claiming existence under the laws of the United States or any other state . . . found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are by the laws thereof liable to be sued, so far as relates to any transaction had in whole or in part, within this state, or any cause of action arising here, but not otherwise . . ."

Court found that the defendant was not "doing business" within the meaning of T.C.A. 20-220, and this holding was affirmed by the Court of appeals.[7]

In Civil Action No. 4165, plaintiffs relied upon a different statute, T.C.A. 48-923, which provides for constructive appointment of the Secretary of State as agent for service of process by foreign corporations doing business in Tennessee without designating an agent for service of process.[8] This Court held that the issue whether defendant was "doing business" in Tennessee had been fully dealt with in No. 3537, and that no new facts had been developed. Accordingly, the process was quashed and the

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[7] "Upon review of the stipulated facts and the applicable law, the conclusion is inescapable on the jurisdictional question herein that the activities of this defendant in the State of Tennessee were insufficient to establish the minimal contacts required under Tennessee law. It follows that the defendant is not amenable to suit in the State of Tennessee and the judgment of the District Court is in all things affirmed." 318 F.2d 447, 450.

[8] T.C.A. 48-923 provides as follows: "**Doing business as appointment of agent to receive process.** — Any foreign corporation who shall do business in Tennessee without designating an agent upon whom process may be served in suits brought against such corporation in the courts of this state as required by law, and who shall make use of the privilege extended by law to foreign corporations to do business in this state upon domestication, shall be deemed thereby to constitute the secretary of state of this state as its agent, for the acceptance of service of process in any civil action brought by any person, firm, corporation or other legal entity, against such undomesticated foreign corporation arising out of such unauthorized business done in this state, and to that end the use of the privilege so extended to foreign corporations upon domestication by an undomesticated foreign corporation shall be treated as an agreement on the latter's part that such service of process shall have the force and validity of personal service on it within the jurisdiction of this state and the county of the action now pending or hereafter instituted."

suit dismissed. This action was affirmed by the Court of Appeals, *per curiam*.[9]

In the present litigation, the plaintiffs have adopted a different tack, asserting authority for service of original process outside the forum state in the provisions of the Securities Act of 1933 (15 U.S.C. 77a, *et seq*) or the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq*) or both. Service was had upon the defendant, Coca-Cola Bottling Corporation, and defendant Mashburn by personal service upon Mashburn[10] in Cincinnati, Ohio. Service was had upon defendant Goldman, Sachs and Company by personal service upon a partner in New York, New York.

Service of original process in a District Court is governed by the provisions of Rule 4, *Federal Rules of Civil Procedure*. Under the terms of that rule, it may be served

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[9] At 338 F.2d 951, the Court of Appeals stated: "The jurisdictional issues in this litigation were previously passed on by this court in another appeal. **Smartt v. Coca-Cola Bottling Corp.**, 318 F.2d 447 (C.A. 6, 1963).

"(2) The District Judge who granted the motion to dismiss (dealing with a statute newly cited by plaintiffs in the instant case) held:

" '* * * Section 48-923 T.C.A. requires "doing business" in this state by a foreign corporation to sustain substituted service of process on the foreign corporation, this issue was fully dealt with in the former action ... Uncontroverted affidavits as well as the deposition of the plaintiff establish that no new facts have developed with respect to the defendant's doing business in Tennessee since the dismissal of the former action.

" 'The Court is accordingly of the opinion that * * * the defendant's motion to quash the service of process herein and dismiss this suit for lack of jurisdiction over the defendant should be sustained.'

"On consideration of the briefs and oral argument this court finds that the District Judge was correct."

[10] Defendant William O. Mashburn, Jr. is President of the defendant Coca-Cola Bottling Corporation. See the affidavit of William O. Mashburn, Jr., dated June 5, 1965.

within the state in which the Court sits or, when authorized by a statute of the United States, outside the state.[11] Both the Securities Act of 1933 and the Securities Exchange Act of 1934 provide for service of original process outside the forum state. The terms of 15 U.S.C. 77v are, in pertinent part, as follows:

> "(a) The district courts of the United States . . . shall have jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty [fol. 4] created by this subchapter. Any such suit or action may be brought in the district wherein the defendant was found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . ."

Likewise, it is provided in 15 U.S.C. 76aa, in pertinent part, as follows:

> "The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter

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[11] Rule 4(f), **Federal Rules of Civil Procedure**, provides: "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state . . . "

or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . ."

Thus, these code sections provide for venue for civil actions based upon alleged violations of the respective Securities Acts, and further provide that process may issue out of a district where venue is proper to "any other district of which the defendant is an inhabitant or wherever the defendant may be found." There is no dispute but that defendants were served where they were, respectively, and inhabitant, or at least where they were respectively found. Accordingly, if venue is properly laid in this district, then the service of process was sufficient to give the Court in personam jurisdiction of the defendants.

Under the code sections hereinabove quoted, venue in a civil action predicated upon an alleged violation of the Securities Act of 1933 or the Securities Act of 1934, or both, would properly lie in a district (1) as to the Act of 1933, in which the offer or sale of the security took place, or, as to the Act of 1934, in which any act or transaction constituting the violation took place, or (2) in which the defendant is found, or (3) in which the defendant is an inhabitant, or (4) in which the defendant transacts business.

[fol. 5] The amended complaint negates that any defendant is an inhabitant of this district,[12] and

[12]The first paragraph of the amended complaint alleges that "... the defendant, Coca-Cola Bottling Corporation, a corporation under the laws of Delaware, has a place of business in Hamilton County in the Western Division of the Southern District of Ohio; the defendant, William O. Mashburn, Jr. is a resident of the same; and defendant, Goldman, Sachs and Company, is a partnership with its principal office in the Southern District of New York."

there is nothing to show that any defendant has been "found" in this district. None of the briefs filed on behalf of plaintiff in this action indicates in any manner that plaintiff contends that any defendant "transacts business" in this district.[13]

It appears to the Court from the foregoing that rulings as to venue and personal jurisdiction must rest upon resolution of the following issues: (1) insofar as the complaint is predicated upon the Securities Act of 1933, whether the complaint states a claim based upon a liability or breach of a duty imposed by the Act, as to which the offer or sale of the security took place in this district; and (2) insofar as the complaint is predicated upon the Securities Exchange Act of 1934, whether the complaint states a claim based upon a liability or breach of a duty imposed by the Act, as to which the act or transaction constituting the violation occurred in this district. It would appear to the Court that each of these issues must be resolved. Proper venue for claims under the Act of 1934 would not necessarily provide proper venue for claims under the Act of 1933,

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[13]Defendants argue that plaintiff would be precluded by the doctrines of **res judicata** or collateral estoppel from contending that the defendants, or any of them, "transacted business" in this district, by virtue of the rulings of this Court and the Court of Appeals in the previous cases. See 30A **Am. Jur.** 394-395, "Judgments" 353. This is not entirely clear. In the first place, two of the present defendants have not been parties to the previous litigation. Secondly, there may be some question as to whether "transacting business" under the federal statutes and "doing business" under the Tennessee statutes are sufficiently similar in meaning to provide an identity of issues, necessary to preclude litigation of the issue of "transacting business." In this regard, although T.C.A. 20-220 provides that "(a)ny such corporation . . . having any transaction with persons, or having any transaction concerning any property situated in this state, through any agency whatever, acting for it within the state, shall be held to be doing business here within the meaning of this section," the Tennessee Courts, as pointed out by the Court of Appeals in the first Smartt opinion, "have not

(Continued on following page)

Rosenburg v. Globe Air-Craft Corp., (D.C. Pa., 1948), 80 F. Supp. 123, and vica versa. Naturally, in order to bring the venue and process provisions of the respective Acts into play, a sufficient claim for relief for a violation or violations thereof must be alleged.

Plaintiffs also assert that the Court has pendent jurisdiction to consider a claim based upon alleged violations of the Tennessee Securities Act and the common law of Tennessee, but it appears to the Court that this presents an entirely different question and should be considered at a later point in this opinion, if necessary.

In her amended complaint, the plaintiff contends that at the time of the actions complained of the defendant Coca-Cola had issued and outstanding 16,679 shares of Class "A" stock, of which she owned and held, and still owns and holds, two shares. She asserts that [fol. 6] defendant Coca-Cola gave notice that it planned a merger with certain wholly owned subsidiaries, and as a part thereof, the Class "A" stock was to be converted into debentures. Plaintiff avers that the notice showed that the transaction in securities had a face value in excess of two million dollars. Plaintiff contends that, with the notices, defendant Coca-Cola sent a written communication through the mails to the stockholders, which communication contained a misleading statement, to wit:

"CONVERSION RIGHTS

"The Class 'A' stock of Coca-Cola is not convertible into stock of any class or into any other securities of

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[13](Continued) given this statute the broad sweep that its language might suggest." 318 F.2d 447, 448. Compare "transaction of business," **United Indus Corp. v. Nuclear Corp. of America**, (D.C. Del. 1964) 237 F. Supp. 971; **Uccelini v. Jones**, (D.C. D.C., 1960) 182 F. Supp. 375; **Securities and Exchange Commission v. Wimer**, (D.C. Pa., 1948) 75 F. Supp. 955.

the company. (This statement does not apply to the conversion of the Class 'A' stock into subordinated debentures which will occur on the effective date of the Articles and Agreement of Merger.)"

Plaintiff contends that defendant's asserted purpose in the elimination of the Class "A" stock as set out in this communication was to place defendant in a position where it would no longer have any stock registered and listed on any national exchange and would no longer be required to file annual and other periodic reports with the Securities Exchange Commission or a stock exchange under the provisions of 15 U.S.C. 78m. The Court will here quote succeeding portions of the amended complaint dealing with asserted violations of the securities laws of the United States:

"It is the contention of the plaintiff that this communication and the transactions pursuant thereto was in violation of the Securities Act of 1933 (15 USC, Section 77a-77aa), and specifically of Section 5 thereof (15 USC, Section 77e) because the transaction was not registered as required by that Act; and of the Securities Exchange Act of 1934 (15 USC, Sections 78a et seq.), and specifically of Section 9 thereof (15 USC, Section 78 i) because the statement quoted in Paragraph IX, supra, was misleading, and because the sale of debentures for stock as complained of herein was at an artificial price, was a forced sale, and was an illegal manipulation of the price of a stock that was registered on a National Exchange; and the communication and transaction complained of was in violation of other portions of the Securities Exchange Act of 1934, such as 15 USC, Section 78 o (a) (since the defendant corporation and defendant Mashburn were not registered dealers)

and 78o (c) (1) because the 'merger' transaction complained of herein was a manipulative, deceptive and fraudulent device which, in effect, was a purchase from the Class 'A' stockholders of their stock; and of 78p because the transaction here complained of was effectively a 'buying' by the Class 'B' stockholders (and specifically by defendant Mashburn, an owner of more than 10 percentum of the Class 'B' stock), of the entire equity interest of the Class 'A' stockholders,

[fol. 7] " XII.

"The transaction was not reported to the Securities Exchange Commission, and the profit realized by the buyers has not been reported to such Commission.

" XIII.

"The defendant corporation did not comply with the Tennessee Securities Law of 1955 and did not comply with the Securities Act of 1933 and the Securities Exchange Act of 1934 in that it made use of means or instruments of transportation or communication in interstate commerce to sell debentures when no registration statement had been filed as required by said Law and Acts; and sent to Hamilton County, Tennessee, a Mr. John M. Bullock, a Director and Secretary of the defendant corporation; and a representative of the defendant, Goldman, Sachs & Company, which is a securities dealer, remunerated by the defendant corporation, came to Chattanooga, in Hamilton County, Tennessee; all the defendants and the said Bullock knowing that there had been no compliance with the Securities Act of 1933, or the Securities Exchange Act of 1934, or the Tennessee Securities Law of 1955, said Goldman, Sachs & Company having a thorough knowledge of the manner and

methods needed to accomplish the transactions dealt with in the communication sent through the mails; and while in Chattanooga the defendants acted in furtherance of the purposes set out above in violation of the various Acts and laws, all to the confusion of and damage to the plaintiff and the class she represents.

"

XIV.

"That the defendant corporation now asserts that the merger is accomplished and that the plaintiff, and others similarly situated, no longer hold Class 'A' stock, but are the owners of debentures representing an indebtedness of the defendant corporation described in the notice and prospectus, into which it is asserted said stock has been effectively converted."

Plaintiff further contends that the defendants conferred with each other by interstate telephone facilities and that the United States mails were used to effectuate the transaction as to the purported conversion. Plaintiff alleges that agents of defendants who thus conferred were remunerated but that fact was not disclosed to Class "A" stockholders in Tennessee.

One of the major arguments advanced by the defendants in support of their contention that the complaint fails to state a claim under either of the federal securities acts is that the complaint fails to show that the plaintiff has complied with the limitations provisions of either of these acts.

Counsel for plaintiff question the propriety of considering the matter of limitations upon a motion to dismiss, asserting that limitations is an affirmative de-

[fol. 8] fense which must be raised by answer in accord-

ance with Rule 7, *Federal Rules of Civil Procedure*. It is true that, at common law, and under the authority of some earlier federal decisions, it was held that the defense of limitations could not be asserted upon a motion to dismiss.[14] However, this rule was subject to one important exception. 2A *Moore's Federal Practice* 2257 Section 12.10; 1A *Barron & Holtzoff, Federal Practice and Procedure* 185, Section 281. Where legislative enactment creates a new cause of action which did not exist under prior law and fixes the time within which the action may be commenced, the commencing of the action within the time specified is an indispensable condition of the liability and the action created, and, upon the expiration of the time established, both the right and the remedy are destroyed. 34 *Am. Jur.* 16-17, 20-22, "Limitation of Actions" 7, 11. In such cases, the complaint must affirmatively show compliance with the condition, and is subject to dismissal for failure to do so. *Moore's, ibid*, p. 2257, *Barron & Holtzoff, ibid*, p. 191. The causes

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[14] It appears that this rule is no longer valid. It now seems to be well-settled that, if the failure to comply with a limitations period appears on the face of the complaint, that defect may be raised by a motion to dismiss. **A. G. Reeves Construction Co. v. Weiss**, (C.A. 6, 1941) 119 F.2d 472; **Berry v. Chrysler Corp.**, (C.A. 6, 1945) 150 F.2d 1002; **Burrell v. LaFollette Coach Lines**, (D.C. Tenn., 1951) 97 F. Supp. 279; **Continental Illinois National Bank & Trust Co. of Chicago v. Ehrhart**, (D.C. Tenn., 1940), 1 F.R.D. 199. See also cases cited at 1A **Barron & Holtzoff, Federal Practice and Procedure** 187-190, Section 281. Likewise, there is substantial authority that where failure to comply with a limitations period does not appear on the face of the complaint, the defect may be raised by motion for summary judgment under Rule 56 or by a "speaking" motion to dismiss which, by virtue of Rule 12(b), may be considered as a motion for summary judgment. See 1A **Barron & Holtzoff, Federal Practice and Procedure**, 191. Section 281; 2A **Moore's Federal Practice** 2257-2258, Section 12.10. In the light of these principles, the limitations problem is properly before the Court in this case whatever view one may take as to the state of the pleadings.

of action created by the Securities Act of 1933 and the Securities Exchange Act of 1934 are subject to various respective limitation periods contained therein, as more fully set out below. A complaint founded thereon is subject to dismissal for failure to show compliance with such limitation period or periods. *Rosenburg v. Hano & Co.*, (E.D. Pa., 1938) 26 F. Supp. 160; *Newberg v. American Dryer Corporation*, (E.D. Pa., 1961) 195 F. Supp. 345.

The complaint contains no allegations as to the time at which the events which are alleged to form the basis of the plaintiff's cause of action occurred. It would accordingly appear to the Court that the complaint fails to state a claim under either the Securities Act of 1933 or the Securities Exchange Act of 1934, and it would therefore further appear that venue would not lie in this district and that the Court would have no in personam jurisdiction over the defendants.

In a brief filed on behalf of plaintiff upon October 17, 1966, counsel for plaintiff states that he would "like to treat the Amended Complaint" as containing certain additional language, to the effect that, among other things,[15] the transactions complained of took place in "the latter part of the year 1960." Although the original complaint has undergone consider-

[fol. 9]

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[15]Counsel for plaintiff, in his brief of October 17, 1966, states: "In conclusion, we would like to treat the Amended Complaint as follows:

"1. At the end of paragraph II, to add the language 'and that said transactions on the part of the defendants took place in the latter part of the year 1960.'

"2. That the last word in paragraph 5 of the prayer be changed from 'agent' to 'agreement.'

"3. That following the first clause of paragraph XI, which ends with a semicolon the language be added 'and Section 12 thereof (15 U.S.C., Section 77l) because of the misleading statement made.'

(Continued on following page)

able revision in this case,[16] no effort has been made to amend the amended complaint in the particulars mentioned in the cited brief. Even under liberal federal rules of pleading, the practice of amending by brief seems inappropriate.

However, even if the amended complaint contained the supplemental language proposed by counsel, plaintiff's position would not be much improved. If the transactions in question took place on December 31, 1960, there would still be a gap of over four years between the transactions and the filing of this action upon March 22, 1965. The limitations provisions applicable to the various sections of the Securities Act of 1933 and the Securities Exchange Act of 1934 are respectively one, two and three years,[17] but in no case is such a period longer than three years.

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[15](Continued) "4. That the seventh line of paragraph XI be changed to read 'and specifically Sections 9 and 10 thereof (15 USC, Section 78 i and j) be-',

"With the above changes, the Amended Complaint is clear and specific."

[16]The original complaint was filed on March 22, 1965. Plaintiff moved to amend on September 23, 1965, and the motion was granted on October 12, 1965. Plaintiff again moved to amend on November 12, 1965. The Court, upon July 27, 1966, directed that plaintiff file an amended complaint, which plaintiff did file on August 11, 1966. Plaintiff moved to "supplement" the complaint and add a party defendant on February 1, 1967, which amendment is presently pending.

[17]The following provisions of the respective federal securities acts establish periods of limitation upon actions for violations of the particular sections thereof relied upon by plaintiff. First, with regard to the Securities Act of 1933: as to actions brought under 15 U.S.C. 77e, 771(1) and (2), 15 U.S.C. 77m provides for a limitation period of one year. Second, with reference to the Securities Exchange Act of 1934: as to actions brought under 15 U.S.C. 78i, subsection (e) thereof provides a limitation period of one year after discovery of the facts constituting the violation and three years after the violation; as to actions brought under 15 U.S.C. 78o(a) and (c)(1), 15 U.S.C. 78cc(b) would appear to be applicable and provides a limitation period of one year after discovery of the violation and three years after the violation; as to violations of 15 U.S.C. 78p, subsection (b) thereof provides for a limitation period of two years after the realization of the profit.

The plaintiff contends that the limitation provisions of the federal securities acts were tolled by the filing of Civil Action No. 3537, reviewed earlier in this opinion, and the maintenance of the succeeding actions, likewise referred to hereinabove. Defendant argues that this cannot be so, because (1) there is no federal "savings" statute, and the commencement of an action tolls a limitation period only for purposes of that action, (2) even if there were a "savings" statute, it could not apply to a cause of action wholly created by a statute which itself provides a limitation period for suits upon such cause, (3) the prior actions were founded upon different theories than the present action, and (4) the individual defendants were not parties defendant to the prior actions.

Although some thirty-one states,[18] including Tennessee,[19] having a savings statute, the Court is not aware of any federal "savings" statute.[20] Plaintiff has cited no

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[18] See footnote 9 to the opinion of the United States Supreme Court in the case of **Burnett v. New York Central Railway Co.**, (1965) 380 U.S. 424, 13 L. Ed. 2d 941, 85 S. Ct. 1050.

[19] T.C.A. 28-106 provides that: "If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest."

[20] Even if there were an applicable "savings" statute, plaintiff might not yet be "saved." There is authority that such a statutory right may only be exercised once. 34 **Am. Jur.** 226, "Limitation of Actions" 279. Further, there is authority that a "savings period" runs only from the termination of an action commenced within the original limitation period, and will not run from the termination of any action commenced after the original period has expired. **Turner v. N.C. & St.L. Ry.**, (1955) 199 Tenn. 137, 285 S.W.2d 122. Finally, "according to the great weight of authority, such a saving clause does not apply where the action is founded wholly upon rights granted by a statute which creates the right of action and specifies the time within which the action may be commenced . . ." 34 **Am. Jur.** 226-227, "Limitation of Actions" 280.

statutory law which would provide for a "savings period", but plaintiff does contend that such has been judicially established by the United States Supreme Court
[fol. 10] in the recent case of *Burnett v. New York Central Railway Co.*, (1965) 380 U.S. 424, 13 L. Ed. 2d 941, 85 S. Ct. 1050. There the petitioner had begun an action under the Federal Employees Liability Act (45 U.S.C. 51 *et seq*) in a state court in Ohio some four days before the limitation provision of the FELA (45 U.S.C. 56) expired. The Ohio court had jurisdiction of the action and the person of the defendant. However, the action was dismissed upon the motion of defendant because venue was improper. Eight days after the dismissal of the state court action, and almost three months after the expiration of the FELA limitation period, plaintiff filed an identical action in the United States District Court for the Southern District of Ohio. The District Court dismissed petitioner's complaint on the ground that the action was barred by the FELA limitation provision. The Supreme Court reversed, holding that the petitioner's state court action tolled the federal limitation provision and that petitioner's federal court action was therefore timely. The Court stated the question in the following terms:

> "The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.' * * * the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." (380 U.S. 426, 427)

The Court then examined the policy of the FELA and the general policy of statutes of limitations, and noted that

the policy of repose underlying limitation of actions is frequently outweighed where "the interests of justice require vindication of the plaintiff's rights." 380 U.S. 428. It was observed that petitioner had not "slept upon his rights," but rather had brought an action within the limitation period in a state court of competent jurisdiction, that the defendant had notice of the action, and that defendant and other railroads had waived venue objections in other similar proceedings. The Court pointed out that the unfairness of barring plaintiff's claim under the circumstances was illustrated by the fact that forty-four states have either a "savings" statute or a "transfer of venue statute" similar to the federal transfer statute (28 U.S.C. 106).

[fol. 11] These factors led the Court to the conclusion that Congress did not intend to bar an action by a plaintiff in the position of petitioner, although the Court specifically rejected the argument that the FELA limitation provision incorporates the Ohio "savings" statute. Observing that the humanitarian purpose of the FELA clearly shows a Congressional intent not to deprive a plaintiff of his rights when no policy underlying a statute of limitations is served in doing so, the Court concluded:

> ". . . when a plaintiff begins a timely FELA action in a state court having jurisdiction, and serves the defendant with process and plaintiff's case is dismissed for improper venue, the FELA limitation is tolled during the pendency of the state suit." (380 U.S. 434-435)

The Court further held that the federal limitation provision was tolled until the state court order of dismissal "becomes final." Upon this point, Justices Douglas and Black, concurring, disagreed.

The Court is compelled to the conclusion that the *Burnett* holding, whatever its efficacy in FELA cases, is

not applicable in the instant situation. In the first place, it is implicit in *Burnett* that its holding is to be restricted to narrow grounds. The holding is stated several times and always with a full recitation of the pertinent facts obtaining in the case. Justice Goldberg, writing for the majority, makes several references to "a given set of facts" (380 U.S. 426) or "given circumstances" (380 U.S. 427). Nowhere is there an indication that the *Burnett* holding is to be given broad application to federal limitation provisions. Second, the Court leans quite heavily upon the humane and remedial policy underlying the FELA, and its holding turns upon its conclusion as to Congressional intent in providing rights and remedies contained in the FELA. The Court is, however, of the opinion that the rationale of *Burnett*, i.e., looking to Congressional intent in providing rights and remedies by federal legislation, is properly germane to the issues in the present litigation.

The Court is aware of no authority which would justify the discovery that Congress, when it established limitation periods in the federal securities acts under dis-
[fol. 12] cussion, intended that such limitation periods be "tolled" under circumstances such as those presented here. Were plaintiff's contentions in this respect to be correct, it would appear that plaintiff could continue her efforts to litigate in this district *ad infinitum*. To rule in plaintiff's favor on this point would render nugatory the policy of repose underlying the doctrine of limitations without, it seems to the Court, serving any valid purpose. The Court holds that the limitation periods provided in the federal securities acts cited herein are not tolled, for the purpose of an action filed at least fifteen months and as much as thirty-nine months after the expiration of such limitations periods, by the commencement of

a prior action within such limitations periods, which action failed for lack of in personam jurisdiction, where defendant could at any time have been sued in its home district. Compliance with applicable limitation periods not appearing from the complaint, the Court is of the opinion that the complaint fails to state a claim under either the Securities Act of 1933 or the Securities Exchange Act of 1934 upon which relief can be granted. It would thus further appear that venue would not properly lie in this district and that the Court lacks in personam jurisdiction of the defendants. The Court is accordingly of the opinion that the amended complaint should be dismissed.

There remains the plaintiff's contention that the Court has pendent jurisdiction of plaintiff's claim for relief based upon alleged violations of the statutes and common law of Tennessee. It would appear to the Court that the Court would lack jurisdiction of the subject matter of the pendent claim where the federal claim has been dismissed. *Wright on Federal Courts*, Section 19, page 57.

An order will enter in accordance with this opinion.

FRANK W. WILSON
United States District Judge

[Caption Omitted]

ORDER OF DISTRICT COURT

(Filed October 26, 1967)

Pursuant to the Opinion of the Court filed herein upon October 4, 1967, it is ORDERED by the Court that this cause be and it hereby is dismissed for failure to state a claim upon which relief can be granted under either the Securities Act of 1933 or the Securities Exchange Act of 1934, for lack of proper venue, and for lack of in personam jurisdiction of the defendants.

It is further ORDERED that the Court retain jurisdiction of this cause for the taxing of costs; that the defendants be and they hereby are allowed fifteen (15) days from and after the entry of this Order within which to file their bill of costs; and that the costs allowed shall constitute a part of this Order.

ENTER:

/s/ Frank W. Wilson
United States District Judge

APPROVED:

WITT, GAITHER, ABERNATHY & WILSON

By /s/ John T. Henniss
John T. Henniss
401 Volunteer Building
Chattanooga, Tennessee 37402
Attorneys for Defendants

[fol. 1]

Nos. 19081-82

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

M. S. CHAMBLISS,

Appellant,

v.

COCA-COLA BOTTLING COMPANY, WILLIAM O. MASHBURN, JR. and GOLDMAN, SACHS & COMPANY,

Appellees.

J. POLK SMARTT and ISABEL SMARTT,

Appellants,

v.

COCA-COLA BOTTLING COMPANY,

Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided July 24, 1969.

Before: WEICK, Chief Judge, and PHILLIPS and EDWARDS, Circuit Judges.

PER CURIAM. These are two separate appeals arising from cases filed against the same defendant by different plaintiffs on different theories, both of which really seek to gain a new trial of a corporate stockholder dispute which has been decided twice before by this Court.

The prior appeals were *Smartt v. Coca-Cola Bottling Corp.*, 318 F.2d 447 (6th Cir.), and *Smartt v. Coca-Cola Bottling Corp.*, 337 F.2d 950 (6th Cir.), cert. denied, 380 U.S. 934.

[fol. 2] The underlying dispute, which has never been reached in the courts on the merits and is not reached in the present cases, concerns a recapitalization in 1960 of the defendant, an Ohio corporation, which resulted, among other things, in the conversion into debentures of a certain class of stock which plaintiffs-appellants assert to be equity stock. Plaintiffs-appellants claim to represent a group of dissident stockholders who made vigorous objection to this change.

The earlier decisions of this Court cited above dealt with the question of whether plaintiffs were able to effect service under Tennessee statutes which would give the United States District Court for the Eastern District of Tennessee jurisdiction over defendant, an Ohio corporation. In both cases the District Court held that the defendant corporation did not do business in Tennessee and was not subject to the jurisdiction of the Court. This Court affirmed in both cases. The record does not reveal why plaintiffs-appellants have failed to file this litigation in the Southern District of Ohio, where jurisdiction over defendant could have been obtained and the issues could have been adjudicated on their merits.

In case No. 19,081, the plaintiffs-appellants sought to relitigate their objections to the conversion plan by obtaining jurisdiction over the defendant in the District Court under the provisions of the Securities Act of 1933 (15 U.S.C. § 77v) or the Securities Exchange Act of 1934 (15 U.S.C. § 78aa) or both. The District Court held that the limitation

periods of both Acts barred the actions and dismissed the case. We affirm.

In case No. 19,082 the District Judge granted a motion requiring plaintiffs to file a security bond for costs and attorneys fees. In response to the Court's order plaintiffs filed a bond of $500. In view of the previous history of this litigation and related litigation, the District Court was of the opinion that this bond was insufficient and otherwise failed to comply with its earlier order. Failure to file the proper cost bond was made grounds for dismissal in an earlier order. We find no abuse of discretion by the District Court in dismissing the action and [fol. 3] accordingly affirm the judgment in case No. 19,082.

In case No. 19,081 plaintiffs-appellants have filed a motion to complete the record on appeal. They complain of a memorandum opinion rendered by the District Judge after filing of the notice of appeal, assessing $9,000 in attorneys fees against plaintiffs-appellants. No order or judgment appears to have been entered effecting this memorandum. This Court would not be inclined on the record now before us to approve such an assessment of attorneys fees against plaintiffs-appellants, but we expressly refrain from passing on this question because an appealable order or judgment is not before us. We reserve a decision on this issue. The motion of plaintiffs-appellants to complete the record on appeal is overruled.

The judgments of the District Court in both cases are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19,081

FILED
JUL 24 1969
CARL W. REUSS, Clerk

M. S. CHAMBLISS,
Plaintiff-Appellant,

v.

COCA-COLA BOTTLING COMPANY, WILLIAM O. MASHBURN, JR. and GOLDMAN, SACHS & COMPANY,
Defendants-Appellees.

JUDGMENT

BEFORE: WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

M. S. CHAMBLISS,
Appellant,
v.
COCA-COLA BOTTLING COMPANY, WILLIAM O. MASHBURN, JR., and GOLDMAN, SACHS & COMPANY,
Appellee.

NO. 19,081

J. POLK SMARTT and ISABEL SMARTT,
Appellants,
v.
COCA-COLA BOTTLING COMPANY,
Appellee.

NO. 19,082

Appeal from the United States District Court for the Eastern District of Tennessee, Southern Division

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT:

M. S. Chambliss and J. Polk Smartt and Isabel Smartt, appellants above-named, present this their Petition for Rehearing in the above-entitled causes, and in support thereof, respectfully show:

I.

In holding that the limitations periods of the Securities Act of 1933 and the Securities Exchange Act of 1934 barred these actions, this Court has decided, contrary to the decision of the Tenth Circuit in *Esplin v. Hirschi*, 402 F.2d 94, that the pendency of a class action does not halt the running of the statute of limitations.

II.

The requirement (upheld by the Court) that an unlimited bond for costs and attorneys' fees is properly a prerequisite to maintaining a suit, is erroneous since requirement of an unlimited bond is clearly unreasonable.

III.

This Court should reconsider its refusal to determine the status of stock tendered into the Court, where the Court clearly has jurisdiction of the stock and of the claimants thereto. Apparently, the Court's refusal is based upon a case in which, due to ignorance of the attorneys and the Courts, jurisdiction was not properly obtained over the person of the defendant. Thus, the Court's present action is based upon a suit that was dismissed without prejudice. Yet this Court, in effect, holds such a case to be *res judicata*.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Petition for Rehearing be granted and the actions of the District Court, upon further consideration, be reversed.

Respectfully submitted,

JAC CHAMBLISS,
1111 Maclellan Building,
Chattanooga, Tennessee 37402,

Attorney for Petitioners and Plaintiffs-Appellants.

CHAMBLISS, HODGE,
BAHNER & CRAWFORD,

Of Counsel.

CERTIFICATE OF COUNSEL

I, Jac Chambliss, attorney for the petitioners, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for purposes of delay.

JAC CHAMBLISS

Nos. 19,081-82

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
SEP 25 1969
CARL W. REUSS, Clerk

M. S. CHAMBLISS,
Appellant,

v.

COCA-COLA BOTTLING CO.,
ET AL,
Appellees.

J. POLK SMARTT and ISABEL
SMARTT,
Appellants,

v.

COCA-COLA BOTTLING COMPANY,
Appellee.

ORDER

Before WEICK, Chief Judge, and PHILLIPS and EDWARDS, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk

[fol. 1] [Caption Omitted]

AMENDED COMPLAINT

(Filed August 11, 1966)

I.

The plaintiff is a citizen and resident of Hamilton County, in the Eastern District of Tennessee; the defendant, Coca-Cola Bottling Corporation, a corporation under the laws of Delaware, has a place of business in Hamilton County in the Western Division of the Southern District of Ohio; the defendant, William O. Mashburn, Jr., is a resident of the same; and defendant, Goldman, Sachs & Company, is a partnership with its principal office in the Southern District of New York.

II.

The cause of action in this case arises out of rights in the stock of the defendant Coca-Cola Bottling Corporation and transactions in regard to said stock in the Southern Division of the Eastern District of Tennessee, and elsewhere, which transactions were in violation of
[fol. 2] the Securities Exchange Act of 1934 and the Securities Act of 1933; and also the Tennessee Securities Law of 1955 and the common law.

III.

The plaintiff is owner and holder of two (2) shares of stock of the defendant corporation, described as Class "A" stock, a duplicate of which is attached as Exhibit No. 1.

IV.

The plaintiff brings this action on behalf of herself and all other holders or former holders of Class "A" stock of defendant corporation.

V.

The number of these holders or former holders is so large that joinder of all of them is impracticable, but the questions of law and fact involved are common to all, the claims of the plaintiff herein and defenses of the defendants are typical of the claims and defenses of or against the class, and the plaintiff will fairly and adequately protect the interests of the class.

VI.

If separate actions were to be prosecuted by the various members of the class, there might well be varying and inconsistent adjudications, partly because the members of the class are not all residents of this District; a determination of the legal effects of the attempted conversion of stock to debentures which is the basis of this action would, as a practical matter, bind the individual members of the class, since a succession of actions regarding this same question would probably be decided the same way, and having knowledge of this fact, the other individual members of the class would accept the first decision as binding.

[fol. 3]

VII.

The defendants have heretofore resisted efforts to submit the questions here involved to adjudication in this court, and have merely denied the power of the Court to act, up to this point; and the questions of law and fact

common to all members of the class, that is the question of the validity of and effect of the merger and attempted conversion of stock to debentures, predominate over any questions affecting only individual members, such questions being dependent upon and subsidiary to the primary question of the validity and legality of said conversion.

VIII.

At the time of the actions complained of the defendant corporation had issued and outstanding 16,679 shares of Class "A" stock, and gave notice that it planned a merger of certain wholly owned subsidiaries with the defendant corporation, showing that the transaction in securities had a face value in excess of Two Million ($2,000,000.00) Dollars. As part of this "merger" the Class "A" stock was to be converted into debentures, which were, in effect, notes payable of the corporation.

IX.

Along with said notices the defendant corporation sent a written communication through the mails to the stockholders (including plaintiff) entitled "Notice and Proxy Statement," which contained a statement that was misleading, which reas as follows:

"CONVERSION RIGHTS

"The Class 'A' stock of Coca-Cola is not convertible into stock of any class or into any other securities of the company. (This statement does not apply to the conversion of the Class 'A' stock into subordinated debentures which will occur on the effective date of the Articles and Agreement of Merger.)"

[fol. 4]

X.

The asserted purpose of the elimination of the Class "A" stock, as set out in this communication, was to place the defendant company in a position where it would no longer have any stock listed and registered on any National Exchange, and would "no longer be required to file annual and other periodic reports with the Securities Exchange Commission or a stock exchange under Section 13 of the Act (15 USC, Section 78 m)."

XI.

It is the contention of the plaintiff that this communication and the transactions pursuant thereto were in violation of the Securities Act of 1933 (15 USC, Section 77a-77aa), and specifically of Section 5 thereof (15 USC, Section 77e) because the transaction was not registered as required by that Act; and of the Securities Exchange Act of 1934 (15 USC, Sections 78 a et seq.), and specifically of Section 9 thereof (15 USC, Section 78 i) because the statement quoted in Paragraph IX, supra, was misleading, and because the sale of debentures for stock as complained of herein was at an artificial price, was a forced sale, and was an illegal manipulation of the price of a stock that was registered on a National Exchange; and the communication and transaction complained of was in violation of other portions of the Securities Exchange Act of 1934, such as 15 USC, Section 78 o (a) (since the defendant corporation and defendant Mashburn were not registered dealers) and 78 o (c)(1) because the "merger" transaction complained of herein was a manipulative, deceptive and fraudulent device which, in effect, was a purchase from the Class "A" stockholders of their stock; and of 78 p because the transaction here complained of was effectively a "buying" by the Class

"B" stockholders (and specifically by defendant Mashburn, an owner of more than 10 percentum of the Class
[fol. 5] "B" stock, of the entire equity interest of the Class "A" stockholders.

XII.

The transaction was not reported to the Securities Exchange Commission, and the profit realized by the buyers has not been reported to such Commission.

XIII.

The defendant corporation did not comply with the Tennessee Securities Law of 1955 and did not comply with the Securities Act of 1933 and the Securities Exchange Act of 1934 in that it made use of means or instruments of transportation or communication in interstate commerce to sell debentures when no registration statement had been filed as required by said Law and Acts; and sent to Hamilton County, Tennessee, a Mr. John R. Bullock, a Director and Secretary of the defendant corporation; and a representative of the defendant, Goldman, Sachs & Company, which is a securities dealer, remunerated by the defendant corporation, came to Chattanooga, in Hamilton County, Tennessee; all the defendants and the said Bullock knowing that there had been no compliance with the Securities Act of 1933, or the Securities Exchange Act of 1934, or the Tennessee Securities Law of 1955, said Goldman, Sachs & Company having a thorough knowledge of the manner and methods needed to accomplish the transaction dealt with in the communication sent through the mails; and while in Chattanooga the defendants acted in furtherance of the purposes set out above in violation of the various Acts and laws, all to the confusion of and damage to the plaintiff and the class she represents.

XIV.

That the defendant corporation now asserts that the merger is accomplished and that the plaintiff, [fol. 6] and others similarly situated, no longer hold Class "A" stock, but are the owners of debentures representing an indebtedness of the defendant corporation described in the notice and prospectus, into which it is asserted said stock has been effectively converted.

XV.

The conduct of the defendants was tortious as well as in violation of the various acts set out above; a suit was filed with respect to the transaction within less than a year of the date when the communication complained of was issued, but defendant corporation and Mashburn have consistently resisted efforts to secure recognition of the rights of the stockholders.

XVI.

The defendants conferred with each other in telephone conversations between Ohio, New York and Tennessee, and interstate transportation and the United States mail were used to effectuate the transaction as to the proposed change in capital structure and issue of debentures to be exchanged for the Class "A" stock; agents who conferred were remunerated, and the fact that they were remunerated was not disclosed to the Class "A" stockholders in Tennessee.

WHEREFORE, the plaintiff prays:

1. That process of this Court issue to be served on the defendant corporation in Hamilton County, Ohio, in the Western Division of the Southern District of Ohio, and like

process be served on defendant, Goldman, Sachs & Company in New York County, New York, in the Southern District of New York in accordance with 15 USC 78 aa and USC, Sec. 77 v (a).

2. That the actions with respect to conversion be decreed void.

[fol. 7] 3. That the defendant be required to notify all stockholders of the ineffectual results of the transactions.

4. That the defendant be required to comply with the Securities Act of 1933, the Securities Exchange Act of 1934 and the Tennessee Securities Law of 1955.

5. That the defendant be required to advise holders of Class "A" stock that it cannot be converted into debentures in the absence of individual agent.

6. That the defendants be required to advise all who held Class "A" stock and all who have accepted debentures in exchange as to their rights to fully inform them under the supervision of the proper Federal and State officials as to the advantages and disadvantages of exchange and allow them to elect what shall be done.

7. That the defendant corporation be required to make such changes in its authorized corporate structure as may be required to effect a status that will insure the rights of the Class "A" stockholders.

8. That the plaintiff and those like situated be awarded monetary damages for the wrongful failure to advise them fully as to the facts.

9. The plaintiff prays for general relief and demands a trial by jury of the issues.

CHAMBLISS, CHAMBLISS & HODGE

BY .....
John A. Chambliss
Attorneys for Plaintiff
1111 Maclellan Building
Chattanooga, Tennessee 37402

[Certificate of Service Omitted]

[Caption Omitted]

MOTION TO SUPPLEMENT COMPLAINT AND ADD PARTY

(Filed February 1, 1967)

Plaintiff moves the Court to enter an order allowing her to supplement her Amended Complaint and add the United States Commissioner of Internal Revenue as a party defendant, and to add a new paragraph, numbered XVII, as follows:

XVII.

Defendant Coca-Cola has, since the filing of this suit, informed the Commissioner of Internal Revenue that the

plaintiff herein has constructively received interest on debentures complained of herein, and the Commissioner is claiming a lien on the shares of stock by virtue of these representations. Coca-Cola claims ownership of the stock, and the plaintiff also claims ownership. The plaintiff therefore herewith tenders to the Court the stock in question.

and add a new demand, as follows:

1a. That the Court determine the ownership of the stock tendered herewith, ordering all claimants, including the defendant Coca-Cola and the Commissioner of Internal Revenue, to enter an appearance and make their claims, in accordance with 28 U.S.C., Section 1655.

CHAMBLISS, HODGE, BAHNER & CRAWFORD

By .....
John A. Chambliss

Attorneys for Plaintiff

[Certificate of Service Omitted]

[fol. 1] [Caption Omitted]

MOTION TO RECONSIDER AND TO AMEND

(Filed November 6, 1967)

Plaintiff moves the Court to reconsider its opinion and order dismissing this case for failure to state a claim upon which relief can be granted, for lack of proper venue, and for lack of in personam jurisdiction of the defendants, for the following reasons:

1. The Court failed to act on the motion to supplement the complaint filed on February 1, 1967, which tendered into the Court the res which is the subject matter of this suit.

2. The Court dismissed the case because the complaint failed to refute the claim of the defendants that the statute of limitations had run, when the complaint clearly shows that the acts complained of are not completed even at the present time, since the defendant corporation is presently trying, by extra-legal methods, to force the plaintiff to relinquish her possession of the stock which has been tendered into Court.

[fol. 2] 3. The Court held that venue did not lie in this district and that the Court lacked in personam jurisdiction of the defendants, despite the fact that it appears clear that among the actions complained of were a visit to Chattanooga, Tennessee, of Mr. J. R. Bullock, a Director and Secretary of the defendant corporation, and of a representative of Goldman, Sachs & Company (a securities dealer paid by the defendant corporation), and the purpose of these visits was the furtherance of the purposes of the violations of law alleged to have occurred.

The plaintiff also moves to amend and supplement its complaint to add a new paragraph XVII, said new paragraph XVII being attached hereto.

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[Footnote 1, Brief for Defendants-Appellees, p. 2]

[1]Including the instant case, there have been five actions filed by the same firm of attorneys to challenge the 1960 merger and recapitalization of defendant Coca-Cola. All have been filed in the U. S. District Court for the Eastern District of Tennessee, Southern Division, where jurisdiction over defendant has been at best doubtful, rather than in Ohio, where jurisdiction over defendant would have been certain. The five:

(1) J. Polk Smartt and Isabel Smartt v. Cincinnati Coca-Cola Bottling Corporation, Civil No. 3735, filed June 30, 1961. This was a class action complaining about, among other things, the conversion of Class A stock into debentures in the 1960 merger and recapitalization, and alleging inter alia that

statements sent to shareholders about the proposed action were misleading. District Judge Wilson quashed the service of process because the Court sitting in Tennessee lacked in personam jurisdiction over defendant. This ruling was affirmed on appeal. *Smartt v. Coca-Cola Bottling Corp.*, 318 F.2d 447 (6th Cir. 1963).

(2) J. Polk Smartt and Isabel Smartt v. Coca-Cola Bottling Corporation, Civil No. 3878, filed May 3, 1962. Plaintiffs voluntarily dismissed this case on May 5, 1962. While defendant did not receive a copy of the Complaint, it is believed to be identical to that in the first action. See pages 34-35 of the deposition of J. Polk Smartt taken in the companion case December 14, 1967 where he indicates that this 1962 action was filed without his knowledge. (This deposition was filed July 26, 1968.)

(3) J. Polk Smartt and Isabel Smartt v. Coca-Cola Bottling Corp., Civil No. 4165, filed August 27, 1963. This was also a class action, again complaining about the conversion of Class A stock into debentures in the 1960 merger and recapitalization, complaining that defendant hired agents in Chattanooga to advise Class A shareholders to surrender their rights as shareholders and accept debentures, complaining that defendant hired agents, including a New York securities broker, to arrange the trade, complaining that the statements in the prospectus and correspondence were coercive and failed to meet the standards required of a corporation in dealing with its shareholders, and complaining that defendant had violated the Tennessee Securities Act and the common law, among other things.

Footnote 1, Brief for Defendants-Appellees

In an opinion filed October 18, 1963 District Judge Wilson held that service of process should be quashed because the court lacked personal jurisdiction over defendant, noting that this action and the voluntarily dismissed action were essentially identical in their allegations to the first suit filed; an order of dismissal for lack of personal jurisdiction over defendant was entered October 31, 1963. The dismissal was affirmed on appeal to this Court. *Smartt v. Coca-Cola Bottling Corp.*, 337 F.2d 950 (6th Cir. 1964), certiorari denied, 380 U.S. 934 (1965).

(4) M. S. Chambliss v. Coca-Cola Bottling Corp. et al, the instant case, Civil No. 4483, filed March 22, 1965. This was also a class action, again complaining of the conversion of Class A shares into debentures, alleging that communications with regard to the proposed merger and recapitalization were misleading, that defendants had violated the federal securities laws in some manner, and that defendants also violated the Tennessee Securities Act and the common law.

(5) J. Polk Smartt and Isabel Smartt v. Coca-Cola Bottling Corp., No. 4689, filed April 5, 1966. This again was a class action complaining of the conversion of Class A shares into debentures in the 1960 merger and recapitalization, alleging violations of the Tennessee Securities Act, the common law, and the federal securities laws. This case is now on appeal here as No. 19082. The appeal does not involve a ruling as to jurisdiction, but only the plaintiffs' failure to comply with a court order for security for costs, including attorney fees.

Bootnote 1, Brief for Defendants-Appellees

Support for the foregoing resume of proceedings is found in the Mashburn Affidavit included in the Appendix in the companion case, No. 19082, pages 23a-28a. That the Court may take judicial notice of its own records, see footnote 2 below.